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Labor Law—May a Union Bargain Away an Employee's Right of Free Speech?—*NLRB v. Gale Prods.*, 337 F.2d 390 (7th Cir. 1964)

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LABOR LAW—MAY A UNION BARGAIN AWAY AN EMPLOYEE'S RIGHT OF FREE SPEECH?—NLRB v. Gale Prods., 337 F.2d 390 (7th Cir. 1964).

Gale Products employs about 1,350 industrial workers, who are represented by Marine Motor Lodge No. 1659, International Association of Machinists, AFL-CIO (referred to herein as IAM). The 1962-64 collective bargaining agreement between the company and IAM contained the following provisions:

> There shall be no other general distribution or posting by employees of pamphlets, advertising or political matter, notices, or any kind of literature upon Company property, other than as herein provided.
>
> No employee is authorized or will be permitted to solicit membership for Insurance Companies, Fraternal, Social or other organizations, or to carry on within the Plant any outside business involving patronage on the part of the Employees. Violation of this rule will result in discharge.[1]

A group of dissident employees, attempting to form an independent union, requested and was denied permission to distribute literature at the company's gates and in its parking lot. Later, these same employees distributed membership cards to employees on the company's premises. This was done on their own time and in nonwork areas. These employees were given "final warning notices" stating that such distribution constituted a contract violation and that further infractions would be considered cause for dismissal.

The National Labor Relations Board found that the company had violated section 8(a)(1) of the National Labor Relations Act,[2] and ordered it to cease and desist from enforcing the contract provisions and to expunge from the record the final warning notices issued to the employees for violation of the contract prohibitions.[3] The Seventh Circuit Court of Appeals, in denying enforcement of the Board's order,[4] based its decision on the "rationale" of *May Dep't Stores Co.* that

> the employees embraced by these contracts, on the assumption

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[1] NLRB v. Gale Prods., 337 F.2d 390, 391 (7th Cir. 1964). [After the setting of this article in page proofs, two cases have been decided by the Sixth Circuit on this same point. They follow the *Gale* holding. Armco Steel Corp. v. NLRB, 59 L.R.R.M., Lab. Arb. 2077 (6th Cir. April 27, 1965); General Motors Corp. v. NLRB, 59 L.R.R.M., Lab. Arb. 2080 (6th Cir. April 27, 1965).]

[2] 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1958). The pertinent language provides: "It shall be an unfair labor practice for an employer —(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title . . . ." Section 7 provides that employees shall have the right of self-organization.

[3] NLRB v. Gale Prods., 337 F.2d 390 (7th Cir. 1964).

[4] Gale Prods., 142 N.L.R.B. 1246 (1963).

> that the latter were entered into by organizations which represented a majority of the employees in an appropriate unit, have thereby effectively *bargained away their right* to engage in union solicitation on the respondent's premises.[5]

The decision in *Gale* is of great importance in the context of the larger problem of protecting personal freedom in an industrial society.[6] The court limited its inquiry to a determination of whether the employer had committed an unfair labor practice under the National Labor Relations Act[7] and failed to deal with the more fundamental problem involved, namely, whether the *union* possessed power to bargain away an employee's constitutionally guaranteed right of free speech.[8]

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[5] 59 N.L.R.B. 976, 981 n.17 (1944). (Emphasis added.) As pointed out by Judge Kiley in his dissenting opinion in *Gale*, the footnote in *May* should not be sufficient grounds for reversing the Board without at least an examination of the problem involved.

Moreover, the Board in *May* considered the effect of contractual waivers upon solicitation engaged in by employees on *behalf* of the incumbent union, whereas the solicitation and distribution of union cards by employees in *Gale* was an expression of *dissatisfaction* with the incumbent union. The legal consequences of the two acts may be different, since the "Bill of Rights of Labor" contained in the Labor Management Reporting and Disclosure Act, 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (Supp. IV 1959), provides: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions . . . ." The speech protected by this section is broader even than that protected by the Constitution, in that constitutionally protected speech does not include libelous utterances, while this section does. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963). While this section of the act applies only to union members, any discussion of a union depriving an employee of his right of free speech must take it into account.

[6] *Compare* Goldwater, *The Union Member as a Person*, 40 U. DET. L.J. 179 (1962), *with* Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953). See also Blumrosen, *Employee Rights, Collective Bargaining, and Our Future Labor Problem*, 15 LAB. L.J. 15 (1964); Comment, 73 YALE L.J. 1215 (1964).

[7] The court concluded that the prohibitions involved were not unilaterally imposed by the company. For an excellent and up-to-date discussion of this area of employer unfair labor practices, see Vanderheyden, *Employee Solicitation and Distribution—A Second Look*, 14 LAB. L.J. 781 (1963).

[8] The court merely stated, without examining or discussing the point, that the prohibitions in the contract were "the fruits of collective bargaining agreed to by the employees involved." NLRB v. Gale Prods., 337 F.2d 390, 391 (7th Cir. 1964). The "fruits" concept implies a give and take between the negotiating parties. It is questionable whether this applies in *Gale*, since the interests of both the employer and the union were at variance with the interests of the employees.

The fundamental question raised, given these premises, is whether the nature of the collective bargaining system requires that certain restrictions be placed on an employee's right to express himself as an individual. No one would argue that management acting alone could impose such restrictions on an employee. Thus, the question is whether the insertion of a union between management and employee makes a difference. In short, may a union contract away the right of member employees to freedom of speech?

The right of employees to organize for collective bargaining and to select representatives of their own choosing is clearly recognized as a fundamental right,[9] and the right to hold views upon any and all controversial questions, to express such views, and to disseminate them to interested persons has also been recognized to be fundamental.[10] Indeed, the Supreme Court of the United States has held that the right of union solicitation is a

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[9] As stated in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937): "That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents." See also Amalgamated Util. Workers v. Edison Co., 309 U.S. 261 (1940); United States v. Moore, 129 Fed. 630 (C.C.N.D. Ala. 1904); Pittman v. Nix, 152 Fla. 378, 11 So. 2d 791 (1943).

[10] The right of employees to form opinions is of little value if such opinions may not be expressed, and the right to express them is of little value if they may not be communicated to those immediately concerned. It has been recognized that the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion guaranteed by the Constitution, Thornhill v. Alabama, 310 U.S. 88 (1940), and that the purpose of the privilege to speak freely is to enable others to make an informed judgment as to issues which concern them, NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941). The constitutional right of free speech carries with it freedom of choice as to the mode of expression that will be employed, and embraces every form and manner of dissemination of ideas that appear best fitted to bring such views and ideas to the attention of those most concerned with them, Schneider v. State, 308 U.S. 147 (1939). It would seem, therefore, that the employees' distribution of literature and solicitation of members in *Gale* must be given effect as an incident of free speech. As stated in *Schneider*, "pamphlets have proved most effective instruments in the dissemination of opinion." *Id.* at 164. It is clear that the most effective method of bringing the pamphlets in *Gale* to the notice of individuals was to distribute them to employees at the plant, the place uniquely appropriate and almost solely available to them for this purpose. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945); NLRB v. United Aircraft Corp., 324 F.2d 128, 129 (1963).

necessary consequence of the constitutional right of free speech.[11] These decisions were simply based on the Court's established principle that, where the peaceful enjoyment of a freedom which the Constitution guarantees is made contingent upon the uncontrolled will of another, it is an unconstitutional censorship or prior restraint upon the enjoyment of that freedom.[12]

In deciding whether a union may contract away an employee's constitutional right of free speech, the interest of the union in self-perpetuation and its obligation to represent the employees in negotiations at the bargaining table must be balanced against the importance of the employee's right to express himself.

With respect to the perpetuation of the union, it is clear that a prohibition of speech as required by the contract provisions in *Gale* would be most beneficial to the contracting union. The effect of these restrictive contractual provisions would go far to insulate the certified union from direct dissent and to preserve its position as the sole bargaining representative. Similar union security devices, such as union shops,[13] agency shops,[14] checkoffs,[15]

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[11] Staub v. City of Baxley, 355 U.S. 313 (1958); Thomas v. Collins, 323 U.S. 516 (1945).

[12] Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Largent v. Texas, 318 U.S. 418 (1943); Jones v. Opelika, 316 U.S. 584 (1942); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[13] See Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956). In this case it was argued that the union shop forced men into ideological and political associations which violated their rights to freedom of conscience, association, and thought protected by the federal constitution. In rejecting this argument, the Court said that there was no more infringement than there would be in the case of a lawyer who is required by state law to be a member of an integrated bar. The Court went on to say that Congress endeavored to safeguard against the possibility of an impairment of the freedom of expression by making it explicit in the act that no conditions to membership may be imposed except periodic dues, initiation fees, and other assessments. See also Blackstone Mills, Inc., 98 N.L.R.B. 410 (1952).

[14] See NLRB v. General Motors Corp., 373 U.S. 734 (1963). The Court observed that the agency shop is practically equivalent to the union shop, since the only membership obligations enforceable under a union shop contract are those relating to payment of periodic dues and fees. See Local 1625, Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746 (1963); Holyoke Cinema Shops, Inc., 139 N.L.R.B. 1321 (1962); Public Serv. Co., 89 N.L.R.B. 418 (1950).

[15] See United States Gypsum Co., 94 N.L.R.B. 112 (1951).

and maintenance of membership clauses[16] have been upheld. However, clauses calling for closed shops[17] or preferential hiring arrangements[18] have been declared to be illegal and void as inimical to the public interest.

The danger inherent in the closed shop is similar to that in allowing prohibitions against union solicitation. If the union is in a position to secure all jobs to its members or dismiss or silence a worker who is dissatisfied with the union, there is very little chance that the union can be unseated from its position as bargaining representative.[19] In this seat, the union has a monopoly

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[16] See American Feed Co., 134 N.L.R.B. 481 (1961); Pressed Steel Car Co., 89 N.L.R.B. 276 (1950).

It has been held, however, that maintenance of membership clauses included in an agreement concluded with a company-favored union at a time when a question of representation existed was invalid and that the discharge of employees who refused to maintain membership in the contracting union was discriminatory. Tappan Stove Co., 66 N.L.R.B. 759 (1946). In addition, the Labor Management Reporting and Disclosure Act requires express authorization by the individual employee before his name may be added to the checkoff. 73 Stat. 538 (1959), 29 U.S.C. § 186(c)(4) (Supp. IV 1959). It would seem that the same rationale may be applicable in *Gale*.

[17] The mere execution of a closed shop is, in itself, violative of the right guaranteed employees to be free to engage in or refrain from engaging in collective bargaining activities, except as permitted under § 8(a)(3) of the act. NLRB v. McCloskey & Co., 255 F.2d 68 (3d Cir. 1957); Local 542, Int'l Union of Operating Eng'rs, 141 N.L.R.B. 53 (1963); Jandel Furs, 100 N.L.R.B. 1390 (1952); Monolith Portland Cement Co., 94 N.L.R.B. 1358 (1951); Charles E. Hires Co., 85 N.L.R.B. 1208 (1949).

[18] A union security provision which requires that union members be given preference in hiring is unlawful. NLRB v. E. F. Shuck Constr. Co., 243 F.2d 519 (9th Cir. 1957); NLRB v. Alaska S.S. Co., 211 F.2d 357 (9th Cir. 1954); Combined Century Theatres, Inc., 123 N.L.R.B. 1759 (1959); County Elec. Co., 116 N.L.R.B. 1080 (1956); American President Lines, Ltd., 101 N.L.R.B. 1417 (1952).

[19] To bring about a new election for a bargaining representative, a petition must be filed with the NLRB either by the employees, pursuant to § 9(c)(1)(A) of the act, or by another union, pursuant to § 9(c)(1)(B). If the petition is filed under (A) "by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a *substantial number* of employees (i) wish to be represented for collective bargaining," the Board investigates it and, if there is reasonable cause to believe that a question of representation exists, a hearing and ultimately an election will be directed. (Emphasis added.) However, under the agreement in *Gale*, no question of representation could arise, since the employees are virtually precluded from organizing sufficiently to be able to show reasonable cause that a question of representation exists.

In the interest of stability of employer-union relations, it is generally held that, where there is a valid existing contract for a period of

control over the job market, as well as control over the individual's free thought and action. Any policy which permits such control to be placed in the hands of private persons or groups, whether unions or others, tends to stifle the initiative of those who have a right to participate in the economic life of union-management relations.

As to the authority of the union to negotiate on behalf of its employees, it has whatever power is necessary to fully perform its functions.[20] The union is authorized to make contracts and agreements which are binding upon all employees in the bargaining unit[21] and to modify such agreements,[22] but only for the limited purpose of securing for them fair and just compensation and good working conditions.[23] The primary purpose in the organization of labor unions and kindred groups is to *protect* their individual members and to secure for them a fair and just remuneration for their labor and favorable conditions under which

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not longer than three years, the Board will not conduct an election until the contract is nearing its expiration date. See General Cable Corp., 139 N.L.R.B. 1123 (1962). However, this contract bar doctrine does not apply where the existing contract contains an illegal union security clause. See McLeod v. Local 476, United Bhd. of Indus. Workers, 288 F.2d 198, 199 (2d Cir. 1961). Furthermore, the Board may apply or waive the contract bar doctrine in its discretion, as the facts of the case may demand, in the interest of fairness in collective bargaining. See Local 1545, United Bhd. of Carpenters v. Vincent, 286 F.2d 127 (2d Cir. 1960); NLRB v. Grace Co., 184 F.2d 126 (8th Cir. 1950).

[20] NLRB v. Draper Corp., 145 F.2d 199 (4th Cir. 1944); Hamer v. Nashawena Mills, Inc., 315 Mass. 160, 52 N.E.2d 22 (1943).

[21] Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945); National Licorice Co. v. NLRB, 309 U.S. 350 (1940); Brisbin v. Lodge 335, Bhd. of Ry. Clerks, 134 Neb. 517, 279 N.W. 277 (1938).

[22] Gaskill v. Roth, 151 F.2d 366 (8th Cir. 1945), *cert. denied,* 327 U.S. 798 (1945).

[23] The National Labor Relations Act, 61 Stat. 143 (1947), 29 U.S.C. § 159 (1958), states that the elected bargaining representatives "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment* . . . ." (Emphasis added.)

It has been held that a labor union has no right to bind its members individually to serve for a definite period, or to surrender what may be generalized as "personal rights." Braddom v. Three Point Coal Corp., 288 Ky. 734, 157 S.W.2d 349 (1941); Piercy v. Louisville & N. Ry., 198 Ky. 477, 248 S.W. 1042 (1923). See also Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (Dist. Ct. App. 1961); The Henry S. Grove, 22 F.2d 444, 447 (D. Md. 1927).

to perform it. The problem of the authority of a union in negotiation was considered by the United States Supreme Court in *Ford Motor Co. v. Huffman,* where Mr. Justice Burton stated:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.[24]

Mr. Justice Burton went on to say that "the bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of all whom it represents."[25] In the instant controversy, it is apparent that the union is serving its own interests at the expense of the very body of men it purports to represent. It is inconceivable that the law could tolerate such a misrepresentation.

It is clear, therefore, that a union should not be allowed to bargain away an employee's right of free speech. An examination of the problem reveals two arguments in support of the proposition that a labor organization does not have the authority to do so: (1) a union, possessing powers comparable to those of a legislature, does not have the power to restrict the constitutional right of free speech; and (2) neither the NLRB nor the courts may constitutionally enforce such agreements.

I. THE UNION—LEGISLATURE ANALOGY

It has been said that there is a very close parallel between governmental bodies and labor unions.[26] One commentator has referred to labor unions as "private industrial governments."[27] This appears to be a proper analogy in view of the many similarities between the two.[28] Both require that representatives be

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[24] 345 U.S. 330, 337-38 (1953).

[25] *Id.* at 338.

[26] Wirtz, *supra* note 6, at 446.

[27] Affeldt, *The Right of Association and Labor Law,* 7 VILL. L. REV. 27, 71 (1961).

[28] See Affeldt, *supra* note 27; Friedmann, *Corporate Power, Government by Private Groups, and the Law,* 57 COLUM. L. REV. 155 (1957). See generally Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power,* 100 U. PA. L. REV. 933 (1952). For a discussion of the limitations on this analogy see Wellington, *The Constitution, the Labor Union, and*

elected by a majority vote of the constituents and that all persons in the particular unit are bound by this majority vote.[29] Unions operate under a constitution and bylaws, assessing and levying taxes (dues) much the same as governmental bodies. The legislative process of these "private industrial governments" takes the form of collective bargaining with the end product—the collective bargaining agreement—more of a statute or code[30] than a typical contract.[31] As Mr. Justice Douglas stated in *United Steelworkers of America v. Warrier & Gulf Nav. Co.*, [32] the collective agreement "calls into being a new common law . . . ."

This characterization of a union is supported by the United States Supreme Court in the landmark case of *Steele v. Louisville & N.R.R.*, where Mr. Chief Justice Stone stated that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[33] He

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"Governmental Action," 70 YALE L.J. 345, 366-74 (1961); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System,* 67 YALE L.J. 1327, 1339-43 (1958).

29 61 Stat. 143 (1947), 29 U.S.C. § 159(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit . . . ."

30 "The 'seniority clause' establishes a law of job rights which parallels significantly the law of property rights which the courts and legislatures have evolved. The 'grievance clause' provides complete administrative and adjudicative procedures for handling any disputes which arise during the contract term. The usual provision that 'no employee will be discharged without just cause as determined in the grievance process' is not basically different from the 'due process of law' protections accorded in public law. The pension and welfare provisions in these agreements bear obvious relationship to the Social Security laws. There is frequently included a 'union shop' provision which has the effect of making membership in the union, like citizenship in a nation, a compulsory condition of remaining in the community.

"The point is not simply that union organization and functioning offers parallels with that of public government and covers similar subject matter. Even more significant is the fact that there is building up around many unions that whole set of allegiances, dependencies and loyalties which are the attributes of government and the fabric of sovereignty." Wirtz, *supra* note 6, at 448.

31 See Chamberlain, *Collective Bargaining and the Concept of Contract,* 48 COLUM. L. REV. 829 (1948).

32 363 U.S. 574, 579 (1960).

33 323 U.S. 192, 202 (1944). See also Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Bhd. of R.R. Trainmen v. Howard, 343 U.S. 768, 773-74 (1951).

also said that a legislature's power to infringe upon the rights of those for whom it legislates is subject to constitutional limitations in that it is "under an affirmative constitutional duty equally to protect those rights"[34] and that the statutory representative has at least as exacting a duty.

This similarity between the legislative function and that of the statutory bargaining representative in negotiating a labor agreement would logically dictate the same approach wherever questions arise as to the validity of negotiated labor agreements or of ordinances or statutes. Since a legislature is without power to prohibit the constitutional guaranty of freedom of speech,[35] so that statutes and ordinances in violation of the guaranty are null and void,[36] it should follow that a bargaining agent clothed with comparable powers and acting by authority of a statute would be bound by the same limitations.[37]

Thus, the power of the union to curtail an individual's freedom for the purpose of protecting the status of the union and the integrity of the collective agreement is not absolute.[38] For example, union and management cannot establish rules which create arbitrary or invidious distinctions,[39] nor can they agree

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[34] 323 U.S. at 198.

[35] See cases cited note 12 *supra.*

[36] See cases cited note 11 *supra.*

[37] It has even been held that the right of free speech, being a fundamental first amendment right, cannot lawfully be infringed, even momentarily, by individuals, any more than by the state itself, and least of all can it be breached by corporations and unincorporated associations which function only by the grace of the state. Spayd v. Lodge 665, Bhd. of R.R. Trainmen, 270 Pa. 67, 113 Atl. 70 (1921).

[38] See generally Christensen, *Free Speech, Propaganda and the National Labor Relations Act,* 38 N.Y.U.L. REV. 243 (1963); Cox, *Rights Under a Labor Agreement,* 69 HARV. L. REV. 601 (1956); Hanslowe, *The Collective Agreement and the Duty of Fair Representation,* 14 LAB. L.J. 1052 (1963); Summers, *Individual Rights in Collective Agreements: A Preliminary Analysis,* 9 BUFFALO L. REV. 239 (1960); Comment, *Unions' Duty of Fair Representation: Does It Exist and Who Should Protect It?,* 9 VILL. L. REV. 306 (1964).

For a comparison of individual rights in the collective bargaining process in the United States and other countries see Laskin, *Collective Bargaining and Individual Rights,* 6 CAN. B.J. 278 (1963); Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States,* 112 U. PA. L. REV. 647 (1964); Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law,* 72 YALE L.J. 421 (1963).

[39] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). See also Syres v. Local 23, Oil Workers Int'l Union, 223 F.2d 739 (1955), *rev'd per*

that the law of the plant shall be applied to that end.[40] In addition, closed shops have been declared to be illegal,[41] the collective parties cannot agree that employment shall be conditioned on obedience to union rules,[42] and the bargaining agent must represent all employees with no discrimination between union and nonunion workers.[43]

At least one writer intimates that a person, by joining a labor organization, surrenders his constitutional rights to these "private industrial governments," but this seems to be based on the erroneous assumption that unions exist for the sole purpose of enhancing the status and respect of the workers[44] and fails to take into consideration the person who is not a union member but who is in the bargaining unit and thus bound by the collective bargaining agreement negotiated by it. Such a contention would appear to be invalid in light of Mr. Justice Murphy's concurring opinion in the *Steele* case, where he stated:

> Congress . . . has conferred upon the union . . . the power to represent the entire craft or class in all collective bargaining matters. While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But *it cannot be assumed that Congress meant to authorize the representative to act so as to ignore the rights guaranteed by the Constitution.* Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals.[45]

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curiam, 350 U.S. 892 (1955). See generally Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

40 Conley v. Gibson, 355 U.S. 41 (1957).

41 See note 17 *supra*.

42 Radio Officers' Union v. NLRB, 347 U.S. 17 (1964).

43 In Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944), Mr. Justice Black stated: "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interest fairly and impartially." See Radio Officers' Union v. NLRB, *supra* note 42; Local 801, Int'l Union of Elec. Workers v. NLRB, 307 F.2d 679 (D.C. Cir. 1962); Hughes Tool Co. v. NLRB, 147 F.2d 69, 74 (5th Cir. 1945).

44 Affeldt, *supra* note 27.

45 Steele v. Louisville & N.R.R., 323 U.S. 192, 208 (1944). (Emphasis added.) *Cf.* J. I. Chase Co. v. NLRB, 321 U.S. 332, 335 (1944).

The facts of the *Steele* case involved racial discrimination, but the rationale of the decision is not restricted to this.[46] It is clear, therefore, that a union could no more restrict an employee's constitutional right of free speech by "bargaining" it away than a legislature could do so by "enacting" it away.

II. CONSTITUTIONAL LIMITATIONS ON JUDICIAL ENFORCEMENT

Even beyond the question of whether a union may negotiate collective bargaining agreements which deprive employees of their right of free speech contrary to the guaranty of the federal constitution, the question arises whether the NLRB or the federal courts may recognize or enforce such agreements.

It is clear that the enforcement of the collective agreement in *Gale* would violate the employee's right of free speech. It would seem to follow from Mr. Justice Murphy's concurring opinion in *Steele* that neither the NLRB nor the courts can do anything which will further an exercise of power by a statutory bargaining representative which violates these constitutional rights.

It has been suggested that the right of free speech in organizational activities is protected by the Constitution against *governmental* infringement but not *employer* or *union* action.[47] However, it was pointed out by Mr. Chief Justice Vinson in *Hurd v. Hodge* that

> the power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the *Constitution,* treaties, federal statutes, and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of the courts to refrain from such exertions of judicial power.[48]

The collective bargaining agreement in *Gale* poses problems analogous in many respects to those in *Hurd,* which was con-

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[46] See Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System, supra* note 28; Note, 65 HARV. L. REV. 490 (1952).

[47] See NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 577 (8th Cir. 1948).

[48] 334 U.S. 24, 34-35 (1948). (Emphasis added.) *Hurd* is the federal companion case to Shelley v. Kraemer, 334 U.S. 1 (1948). The Court recognized that it was not consistent with the public policy of the United States to permit federal courts to abuse powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of equal protection of the laws.

cerned with covenants incorporated in private conveyances of real estate forbidding the rental, lease, sale, or conveyance of the land to any Negro. The Court held that enforcement of these private agreements was prohibited as violative of public policy.

Prior to *Hurd*, the Court, in *Buchanan v. Warley*,[49] had declared unconstitutional racial restrictive *ordinances* which had been adopted in a number of Southern cities. The response to *Warley* was the racial restrictive *agreement* which set the stage for the *Hurd* decision.

The same pattern can be seen in the relationship between free speech and collective bargaining agreements. In *Staub v. City of Baxley*[50] and *Thomas v. Collins*,[51] the Court held that the statutes and ordinances involved placed an unconstitutional restraint on freedom of speech. Here, the next step in the analogical process is the *Gale* case, which poses the problem of free speech in relation to private agreements in the same manner as *Hurd* posed the problem of segregation in relation to private agreements. *Hurd* held that there is no authority in the courts to exercise functions expressly banned by the Constitution. The same rationale should restrain the courts from enforcing such prohibitions contained in collective bargaining agreements.[52]

III. CONCLUSION

The court in *Gale* concentrated on whether the *company* had committed an unfair labor practice. Two other issues should have been considered, namely, whether the *union* had committed an unfair labor practice, and more fundamentally, whether the union possessed power to bargain away an employee's constitutionally guaranteed right of free speech.

It could well have been found that the contract in question was an arbitrary interference with the employees' freedom of speech and a palpable abuse of power for the purpose of benefitting those who imposed the restraint. Such action arguably

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[49] 245 U.S. 60 (1917).

[50] 355 U.S. 313 (1958).

[51] 323 U.S. 516 (1945).

[52] In NLRB v. Pacific Am. Shipowner's Ass'n, 218 F.2d 913, 917 n.3 (9th Cir. 1955), it was suggested that the National Labor Relations Board and the courts may not be able to enforce such agreements as a limitation upon the proviso of § 8(b)(1)(A) of the National Labor Relations Act.

constituted an unfair labor practice even if the union had the power to carry it out.

The union should have been held to lack such power for two reasons: (1) unions should be held subject to substantially the same constitutional limitations imposed upon legislatures, which unions closely resemble in form and function; and (2) neither the courts nor the NLRB may constitutionally enforce private restraints upon the freedom of speech.

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